IS A GIFT OF MONEY TAXABLE AS INCOME?

I have just read with interest your leading editorial in the September issue of the VIRGINIA LAW REGISTER (2 Va. Law Reg., N. S., 375) on the subject "Is a gift of money taxable as income?" in which you take issue with me on a recent decision rendered to the Auditor of Public Accounts on that same subject. As your information in regard to that opinion was derived from the newspapers, I am taking the liberty of reproducing the reasoning of said opinion in full:

The provisions of § 10 of the tax laws which are necessary to be construed are as follows:

"The classification under Schedule D providing for the taxation of income is as follows: The aggregate amount of income of each person or corporation, whether received or due but not received within the year next preceding the first of January in each year, subject to the deductions and exemptions herein below recited. Income shall include * * * 6th: All other gains and profits derived from any source whatever."

The enumerations under the first, second, third, fourth and fifth classes include rents, interest upon bonds, annuities, profits from earnings of a business done in or out of Virginia, sales of live stock, etc., sales of wood, butter, cheese, etc.

In *Commonwealth* v. *Werth,* 116 Virginia 604, the court in construing the income tax law of Virginia as it then stood, held that the general clause six, referred to above, to-wit: "All other gains and profits derived from any source whatever," embraced the fees received by lawyers for their services. In construing this section the court said:

"The subject-matter of Schedule D is 'income,' and not the source from which it is derived; and the reverse of that would have to be the case in order to apply the rule of *ejusdem generis* to its interpretation. The language of the schedule, read as a whole, leaves no escape from the conclusion that it was the intention of the legislature to impose a tax on income generally. After enumerating in the first four classes what 'income' shall include with respect to certain sources from which it may be derived, the fifth clause declares that it shall include 'all other gains and profits derived from any source whatever.' This broad lan-

guage would in large measure be nullified by limiting its operation to income derived, not 'from any source whatever,' but only from sources similar to those embraced in the enumerated classes. By what process of ratiocination can it be said that income derived from 'any source whatever,' is the equivalent of incomes derived only from 'special sources'?"

And so the court refused to apply the doctrine of *ejusdem generis* and to hold that the language of the general clause was limited by the other clauses enumerated in the statute.

Black on Income Taxes, in § 33, discusses the meaning of "profits" and "gains" as used in the income tax laws, and after giving the definition of "profits" and the application of that definition in various cases, uses the following language with regard to the definition of "gains" on page 80:

"It is not quite so easy to account for the use of the word 'gain' in conjunction with the two other terms which we have been considering. But it may probably be said that when a tax law employs the phrase 'gains, profits and income,' to describe what is taxable, the term 'gains' is inserted out of abundant caution, and intended to include an acquisition of the taxpayer which is not to be described as a 'profit' and which might not be included in the term 'income' if that word were taken in a narrow sense. Properly speaking, 'gain' means that which is acquired or comes as a benefit, and in a statute laying an income tax it may mean money received within the year which is not the fruit of a business transaction nor of the labor or exertion of the individual, but something arising from fortuitous circumstances or conditions which he does not control. In this signification the term would include money received as a legacy or money won on a wager."

And again in § 38, page 88, in discussing the same question, the learned author says:

"Suppose, for example, that one receives a gift of money from a relative, or draws a prize in a lottery or in any form of competition, or wins a bet on a race or at the gaming table, or (to take a worthier illustration) receives an award in money, not as payment for services but in recognition of meritorious conduct or achievement or discovery—such as the Nobel prize—it is clear that he makes a gain though not a 'profit,' and that the sum received is 'income' as distinguished from 'principal or capital.' The Federal income tax law includes 'the income from,

but not the value of, property acquired by gift, bequest, devise or descent.' But aside from this specific exception, and as the problem might arise under other taxing laws, the question whether an acquisition of the kind supposed would be taxable as income must depend upon the construction of the statutes. They contain terms broad enough to cover all such cases, as, where the act of Congress in force declares that the tax shall be laid on 'the entire net income received from all sources, and upon 'gains or profits and income derived from any source whatever,' and the Wisconsin statute, after enumerating certain items, taxes 'all other income of any kind derived from any source whatever.' If these expressions are to be construed as effective to the full extent of the language employed, they would undoubtedly include gifts, winnings, and pecuniary awards or prizes. But if, following the usual rule of statutory construction, the generality of these expressions is to be restricted by a comparison with the more specific terms used in the context, then they would include only gains or income from sources similar to, or comparable with, those already enumerated, such as salaries, professional earnings, mercantile business, invested capital, and so on."

As we have seen above our court refused to apply to our law the doctrine of *ejusdem generis,* and therefore we may conclude that under the sixth general clause, "all other gains or profits derived from any source whatever," should be included gifts of money and that such gifts are taxable as income.

In the course of your editorial you refer to *Ex parte Webber,* 18 Q. B. 111, 56 L. J. Q. B. 209, and *Ex parte Wicks,* 17 Ch. Div. 70-73, L. J. C. H. 620, as sustaining the position taken by you that a gift or voluntary allowance of money is not income, and therefore is not taxable.

In the case of *Ex parte Webber, supra,* it was held that a voluntary allowance of money granted by the Secretary of State for India to an officer of the Indian Army on compulsory retirement, to which the recipient had no claim or right, and which could be withdrawn at any time at the discretion of the Secretary of State, was not income within the meaning of the bankrupt act, giving power to the court to order that a portion of the bankrupt's pay or salary should be paid to the Trustee in cases where the bankrupt was an officer of the army or navy, and providing further that where a bankrupt was in receipt of a salary

or *income* other than as aforesaid, the court on application of the Trustee should from time to time make such order as it thought best for the payment of the salary or income to the Trustee.

In delivering the opinion, the court followed the decision in *Ex parte Wicks* in holding that a voluntary gift was not income within the meaning of the aforesaid clause of the bankrupt act.

In *Ex parte Wicks, supra,* the court construed § 90 of the bankrupt act, which is in terms as follows:

"Where a bankrupt is in the receipt of a salary or income other than as aforesaid, the court, upon the application of the trustee, shall, from time to time, make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee during the bankruptcy, and to the Registrar if necessary, after the close of the bankruptcy, to be applied by him in such manner as the court may direct."

The question involved here was whether a voluntary allowance of £200. per annum to a bankrupt was income within the meaning of said act. In deciding the case, Cotton, L. J., used the following language (page 73).

"Section 89 applies to salary or income received by a bankrupt in respect of services rendered by him in various ways—income to which the bankrupt has a legal claim. Then comes § 90 to sweep in any other kind of salary or income; and in my opinion it was intended to apply to something of a similar character, which is not included in the previous section."

Thus it is apparent that the doctrine of *ejusdem generis* was applied in this case, and it is also apparent that it was not a question of taxation which was involved, but a question of the right of a creditor to diminish a voluntary allowance to a bankrupt when such voluntary allowance could have been withdrawn at any time.

Thus it is clear that these cases are to be distinguished from the question now being discussed on two grounds; first, that no question of taxation is involved in these cases; and, second, in construing the bankrupt act, the English courts have applied the doctrine of *ejusdem generis,* whereas, in construing our income tax law, our court has negatived the idea that the doctrine of

ejusdem generis must be applied in order to ascertain whether a given income, profit or gain is subject to taxation, and holds that all gains and profits, irrespective of their sources, should be returned for taxation. This is in accordance with the principle that the doctrine of *ejusdem generis* is but a rule of construction and should only be invoked in doubtful cases to clear up language which is ambiguous.

As has already been shown the two English cases cited by you do not construe the income tax law but the bankrupt act. Let us now examine an English case which does construe the income tax law and is directly in point.

In *Cooper* v. *Blakiston,* 2 K. B. 688, it was held by the Court of Appeals that Easter offerings given to the incumbent of a benefice as such for the purpose of augmenting his stipend, were *profits* accruing to him by reason of his office, and that he was liable to pay an income tax in respect to such Easter offerings. The question which was discussed in this case was whether a voluntary Easter offering received by the incumbent of a benefice came within the provisions of the statute causing income duties to be charged respectively on the persons using or exercising the offices or employments of profits mentioned in Schedule E, or to whom the annuities, stipends or pensions mentioned in said schedule should be payable, for all salaries, fees, wages, perquisites or profits whatsoever accruing by reason of such offices, employments or pensions.

In discussing the question Lord Alverstone, C. J., used the following language on page 694:

"Those words are very general, and are of necessity made so because it is intended in a taxing act not to let persons escape taxation by reason of special facts in respect of which it was not meant that there should be an exemption from taxation, and to prevent distinctions being drawn which would lead to an evasion of the tax. In the first place, I will assume for the purposes of my judgment that the Easter offerings in this case were *absolutely voluntary and freewill offerings,* and that there was no obligation on anyone to contribute to them; and I think it must be taken that the letter of the Bishop, which is set out in this case, was the basis upon which these contributions were made." (Italics mine).

The learned Chief Justice, in developing the argument, takes for granted that the fact that the offerings were voluntary does not affect the decision of the case, and confines himself almost entirely to the question of whether the offerings were to be taken as personal rather than gained by reason of the office.

Surely if voluntary offerings made to a Vicar with respect to his office are subject to an income tax under the above statute, there is no reason to exclude a voluntary contribution made by one person to another from an income tax under our statute; for the construction of the English statute shows that under the term profit" therein used must be included voluntary offerings, whereas under our statute the question is whether a gift must be included under the general term "all other gains or profits derived from any source whatever."

Not directly in point, but interesting and instructive, is the case of *Partridge* v. *Mallandaine,* 18 Q. B. 276, in which it was held that persons receiving profits from betting systematically carried on by them throughout the year were chargeable with income taxes on such profits in respect of a vocation under Schedule D of the English income tax law. It was argued in this case that betting was not a vocation or employment, but merely an amusement, and that, as bets were void and not recoverable in law, the legislature did not intend that money so received should be assessed as income. The court took the position that even though the bets were made null and void by Act of Parliament, the fact that the vocation was unlawful could not be set up against the demand for an income tax.

It is proper to state that Hon. C. Lee Moore, Auditor of Public Accounts, after reviewing my opinion, adopted the same.

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